IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.236 OF 1988

The Union of India,
owning & Representing
a) Central Railway,
b) South-Eastern railway,
c) Eastern Railway, ...Appellants.

V/s.

1. M/s. Voltas Limited,
2. M/s. National Insurance Company Ltd. ...Respondents.

.....

Mr. A.N.Samant, Advocate for the appellants.
Mr. Prakash N. Saderangani,Advocate for the Respondent No.1 and 2.

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CORAM: A. S. OKA, J.

DATE : 20TH JULY, 2004

ORAL JUDGMENT :

1. This Second Appeal was admitted on 28th April, 1988 by observing that ground No.3 in the memorandum of Appeal was the substantial question of law. The said Ground No.3 reads thus:

> "The Substantial Question of Law is that the Lower Appellate court has ignored the interpretation of "Excepted Article" Portion and its proportion in terms of value with other components, and the final conclusion that if the excepted article portion is more

in terms of value than that of the other components, then the whole of the article has to be categorised as "Excepted Article".

2. The learned Counsel appearing for the Appellants Shri Samant contended that apart from the said substantial question of law, there are other substantial questions of law which arise. He submitted that a notice as contemplated by Section 78-B of the Indian Railways Act, 1890(hereinafter, referred to as the said Act.) was not served on Central Railway which is one of the 3 railway administrations against whom suit was filed by Respondent. He submitted that the notice dated 9th August, 1974 purporting to be a notice under section 78-B cannot be treated as a notice under section 78-B and in any event even assuming that it is a valid notice the same is not served upon the Central Railway Administration. He, therefore, submitted that decree could not have been passed against the Central Railway Administration. He further relied upon section 80 of the Act and submitted that a suit could have been lawfully maintained in the Civil Court at Thane only against Central Railway and not against the South Eastern Railway and Western Railway. He submitted that in that behalf also failure to serve notice under

section 78-B of the said Act on Central Railway is relevant. Though this court has not framed substantial question of law on the said aspect, I have heard the Counsel appearing for the parties on substantial question of law as framed at the time of admission as well as the aforesaid two questions raised by Shri Samant.

3. Before considering submissions made by the counsel appearing for the parties it is necessary to refer to the facts of the case in brief. The case of the Respondent is that a consignment which was well-packed was made over to Central Railway on 10th July, 1974 and there was a short delivery at the destination which was coming in the jurisdiction of South Eastern Railway. The case of the Respondent is that as a result of short delivery, Respondent suffered loss of Rs.15,000/-. Therefore, the suit was filed by the Respondent. The suit was resisted by the Appellant by filing Written Statement. A contention is specifically raised in the Written Statement that the consignment of goods was containing drilling accessories used for the purpose of undertaking drilling. The equipment in the consignment was fitted with natural diamonds and therefore, the articles were covered by "Excepted Articles". It

is further contended that the Articles forming part of the consignment were covered by the Schedule II under the Said Act and therefore, a declaration ought to have been made at the time of delivering consignment to the Railway administration. It is submitted that there is non-compliance with section 77-B of the said Act. In the Written Statement, the Respondent also contested on merits.

4. The Trial Court partly decreed the suit and directed the Appellants to pay a sum of Rs.13,532/- with interest thereon at the rate of 6% per annum from the date of the suit till the date of the payment. the Trial Court did not frame any issue regarding jurisdiction based on section 80 of the said Act. An Appeal was preferred by the Appellants to the District Court. The said Appeal has been dismissed and therefore, the Appellants have preferred the Second Appeal.

5. In so far as the last contention of Shri Samant based on Section 80 of the Said Act is concerned, I find that the said contention is not taken in the written statement. It appears that apart from the fact that said contention was not taken in the written statement, the same was not raised at any time during the pendency of the suit

and therefore, an issue was not framed by the Trial Court based on the same. Section 21 of the Code of Civil Procedure, 1908 reads thus:

> **Section 21. Objection to jurisdiction -** [(1) No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.
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> [(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.
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> (3) No objection as to the competence of the executing Court with reference to the local

> limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.]"

The objection raised by Shri Samant is only as regards teritorrial jurisdiction of the Trial Court. In view of the provisions of Section 21, the objection based on Section 80 of the said Act cannot be allowed to be raised for the first time in the Second Appeal under Section 100 of the said Code unless it is proved that there is a consequent failure of justice. No such case of failure of Justice has been made out.

6. Shri Samant, the learned counsel for the Appellant contended that notice dated 9th August, 1974(Ex.46) cannot be considered as a notice under section 78-B of the Said Act. He submitted that it is in substance a letter addressed to the National Insurance company and copies thereof are forwarded to General Manager of South Eastern Railway. He submitted that even if the said letter is considered to be a notice under Section 78-B, a suit could not have been maintained against Central

Railway Administration on the basis of the said notice. The said notice is admittedly not given to the Central Railway. If the said notice dated 9/8/1974 is read, it is clear that it is addressed to the General Managers of South Eastern Railway and Eastern Railway and only a copy is endorsed to the National Insurance Company Ltd. In the notice it is specifically mentioned that the same is given under section 78-B of the Indian Railway (amendment) Act, 1961 for shortage/damage/loss/-destruction/detioration. In my view, the notice dated 9th August, 1974 is a notice contemplated by section 78-B of the said Act. A specific claim on account of loss is made by the said notice. The only question which is required to be considered is what is the effect of failure to serve the notice on the Central Railway.

7. Section 78-B reads thus :

> "78-B. **Notification of claims to refunds of overcharges and to compensation for losses -** A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction, damage, deterioration or non-delivery of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf -
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> (a) to the railway administration to which the animals or goods were delivered to be carried by railway, or

(b) to the railway administration on whose railway the destination station lies, or the loss, destruction, damage or deterioration occurred,

within six months from the date of the delivery of the animals or goods for carriage by railway:

Provided that any information demanded or inquiry made in writing from, or any complaint made in writing to any of the railway administrations mentioned above by or on behalf of the person within the said period of six months regarding the non-delivery or delay in delivery of the animals or goods with particulars sufficient to identify the consignment of such animals or goods shall, for the purpose of this section, be deemed to be a claim to the refund or compensation."

Section 78-B was brought on statute by virtue of 1961 amendment to the said Act. Section 78-B provides that a claim to the refund or compensation has to be preferred in writing to the Railway administration to which animals or goods were delivered to be carried by railway or to the Railway Administration on whose destination station lies or the loss or destruction, damage or deterioration occurred. On plain reading of section 78-B, it is clear that the claim as to the refund or compensation has to be preferred in writing either to the Railway Administration to which the goods were entrusted or to the Railway administration on whose railway destination station lies or the loss, destruction, damage or deterioration occurred. In the facts of the case,

the goods were delivered to Central Railway and the Eastern Railway is the Railway administration on whose railway destination the station lies. On plain reading of section 78-B claim could have been made to one of the two railways. In this connection Shri Samant relied upon the Judgment of the Apex Court reported in **AIR 1962 Supreme Court page 1879**, (Jetmull Bhojraj V/s. Darjeeling Himalayan Railway Co. Ltd. & Ors.) The Apex Court was dealing with interpretation of Section 77 of the said Act as was on statute book prior to 1961 amendment to the said Act. Section 77 is quoted by Apex court in paragraph no.6 of the said Judgment. In the context of language used in section 77, the Apex Court held that notice under section 77 must be given to every railway administration against whom a suit is eventually filed. Paragraph no.6 and paragraph no.22 of the Judgment of the Apex Court read thus :

> (6) The other reason why the appeal should fail is that no notice under S. 77 of the Railways Act, 1890 had been given. That section so far as is material in these terms:
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> > "S.77. A person shall not be entitled ... ... to compensation for the loss, destruction or deterioration of .... goods delivered to be .... carried, unless his claim to the compensation has been preferred in writing by him or on his behalf to the railway administration, within

> six months from the date of the delivery of the.... .... goods for carriage by the railway."
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> The section requires a claim for compensation for the loss, destruction or deterioration of goods to be preferred to the railway administration within six months of the delivery of the goods to the railway for carriage. It is well settled that the section is mandatory. If a claim is not preferred within the time mentioned, it cannot be recovered from the railway; a suit for such recovery must be dismissed."
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> "(22) Upon the language of S.77 it would appear that a notice thereunder must be given to every railway administration against whom a suit is eventually filed. No such notice was given by the appellant to the G.I.P. Railway administration within six months of booking the consignment and therefore, in so far as they are concerned the suit must be held to have been rightly dismissed. That, however, would not help the second defendant. For, so far as this defendant is concerned, as we have already held, a notice under S.77 was given within six months from the date of booking."

It is therefore, very clear to me that the view taken by the Apex Court is based on the language of section 77. When Section 78B was brought on the statute book by the amendment of 1961, option was given to claimant to make claim to one of the two railways. Such option was not provided for in the Section 77 of the said Act which was on Statute Book at the relevant time. In view of this position, the notice under section 78B cannot be said to be bad in law as the same is served only on two out of the three railway administrations

against whom suit is filed. Shri Samant, learned Counsel appearing for the Appellant also placed reliance upon the Judgment of this Court reported in AIR 1985 BOMBAY page 84, (Union of India V/s M/s K.T.Rizvi & Ors.) In the said Judgment, the question was regarding the starting point for computing period of 6 months for issuing notice under section 78-B. The issue is involved in this Second Appeal is totally different. Hence this judgment does not help the Appellant. Hence the courts below have not committed any error when notice under Section 78-B was held valid for filing suit against three Railway Administrations. Failure to serve the notice on Central Railway is not fatal.

8. The learned Counsel for Appellants has pointed out the description of the goods which were part of the consignment. He has also referred to the oral evidence of the officer examined on behalf of the Respondent and from the description of the articles and from the admissions given by the witnesses examined by the Respondent, Shri Samant contended that Section 77-B of the said Act is squarely applicable. He relied upon the entries incorporated in Second Schedule and in particular item No.(d) thereof. He submitted that the suit

consignment consisted of precious stones like diamonds. He invited my attention to the examination-in-chief and cross-examination of the witness examined by the respondent. He submitted that the articles comprising of the consignment was squarely covered by the Second Schedule. He submitted that the consignment consisted of diamonds which are covered by the item 'precious jwellary'. In this connection, it is necessary to refer to the Division Bench Judgment reported in AIR 1955 Bombay page 98,(Dominion of India V/s Eversharp Agency.) The question before the Division Bench was that whether a fountain pen having a nib or a clip or even a cap of gold was an "excepted article" covered by Schedule II. The Division Bench after referring to a Judgment of Calcutta High Court held that merely because a fountain pen has a nib or a clip or even a cap of gold it is impossible to say it is a gold manufactured. The Division Bench held that essentially it is a fountain pen made of bakelite. Some parts of it contain gold, but even so it could not be said of this article that its predominant feature is gold and that the article is of gold.

9. In my view, the ratio of the Judgment of the Division bench is squarely applicable to the facts

of the case. The witness examined by the Respondent has admitted that the articles in the consignment can be described as Diamond Drill Bits and the said articles are mining spares. He stated that the articles were removable boring heads attached to the Drilling Machine. Even it is assumed that diamonds were used in the mining spares in question, the mining spares or Drill Bits do not loose its predominant character of equipment or spares. By no stretch of imagination, the articles forming part of the consignment can be treated as pearls or jwellary. It remains to be the spares used in mining equipments and merely because some diamonds are used while manufacturing the same, the Second Schedule will not be attracted.

9. In view of the aforesaid position, there is no substance in the submissions of Shri Samant, the learned Counsel appearing for the Appellant. There is no merit in the Second Appeal and the same is dismissed with no order as to cost.

JUDGE